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IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 607.

The State of Missouri, at the Relation of Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executor of the Estate of Floyd E. Jacobs, Deceased; and Mildred B. Johnson, Administratrix of the Estate of John T. Barker, Deceased, and Mary G. Jacobs, Executrix of the Estate of Floyd E. Jacobs, Deceased,
Appellants,

vs.

Jack L. Clay (Successor to C. Lawrence Leggett), Superintendent of the Division of Insurance, Department of Business and Administration of the State of Missouri, et al.,
Appellees.

Appeal from the Supreme Court of Missouri.

## SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, AETNA INSURANCE COMPANY, A CORPORATION.

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## SEPARATE MOTION TO AFFIRM OR ALTERNATIVE MOTION TO DISMISS OF APPELLEE, AETNA INSURANCE COMPANY, A CORPORATION.

Aetna Insurance Company, one of the appellees in the above entitled cause, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves

that the final judgment of the Supreme Court of Missouri be affirmed or, in the alternative, that the appeal herein be dismissed upon the following grounds:

(1) There was not drawn into question the validity of any State statute on the ground of its being repugnant to the Constitution of the United States, so there was no decision in favor of its validity.

(2) No substantial Federal question is involved.

(3) The judgment appealed from is based on a question of fact, the interpretation of a contract, and not of law and is not reviewable by this Court.

(4) The judgment rests on an adequate non-Federal basis, and the case requires no further argument.

## STATEMENT.

This is a direct appeal from the final judgment of the Supreme Court of Missouri in two actions consolidated for argument in the Supreme Court and disposed of by the Court in one opinion and in one judgment which affirmed the judgments of the trial court, Circuit Court, dismissing the petitions of Messrs. Barker and Jacobs for attorneys' fees. **State v. Leggett**, 359 S. W. 2d 790. Barker and Jacobs died during the pendency of the cases in the Circuit Court and their respective legal representatives were substituted in their stead.

This case is the most recent in a long series of cases over the same subject matter which stemmed from the decision of the Supreme Court of Missouri in **Aetna Ins. Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, decided in 1938. The opinion in that case recites that Barker and Jacobs were employed by the Superintendent of Insurance to recover certain excess premiums collected by fire and windstorm insurance companies after a rate reduction order. The contract of employment provided if Barker and Jacobs were successful in recovering such funds they should be compensated for their services from the funds so recovered in such an amount as the trial court might deem adequate.

Funds in excess of $2,750,000 were paid into the Circuit Court by the insurance companies and Barker and Jacobs were allowed a fee of $275,000 by the Circuit Court which was declared a lien upon the funds. On appeal from this allowance, the Supreme Court held that while the Superintendent of Insurance had a right to employ Barker and Jacobs to recover funds in the restitution proceedings, he had no authority to contract that they should be paid for their services out of the funds restored to him, and held the Circuit Court erred in allowing such fees from the

funds so recovered. The Supreme Court then added that the only way the attorneys could be compensated would be by an appropriation by the legislature.

While appellants claim they have received nothing, the fact is Barker and Jacobs received $100,000 through an appropriation by the legislature (359 S. W. 2d 790, 794), and from time to time sought additional appropriations (359 S. W. 2d 790, 795).

In one form or another, the Supreme Court has considered the basic questions involved in this case on many occasions (359 S. W. 2d 790, 792).

In a prior case involving these same claims, namely, **Barker v. Leggett**, 295 S. W. 2d 836, 840, after denying recovery, the Supreme Court said:

"We believe it is the intent of the insurance code to vest the superintendent with primary jurisdiction to **approve** the usual expenses and to **assess** the expenses of proceedings against companies. We believe this right of primary decision by the superintendent is exclusive, subject only to review by the courts in the manner provided in the insurance code or as otherwise provided by Chapter 536, R. S. Mo. 1949, V. A. M. S., and more particularly § 536.100 dealing with judicial review of administrative decisions." (Emphasis is that shown in published opinion.)

The reference in the above quotation to "§ 536.100, R. S. Mo. 1949, V. A. M. S., was obviously inexact because such section applies to administrative review only in so-called "contested cases", as defined in § 536.010, R. S. Mo. 1949, and does not comprehend the type of decision by the Superintendent of Insurance here involved because no hearing on such decision is required. Review of this type of decision is by suit de novo in the Circuit Court as pro

vided in § 536.105, R. S. Mo. 1949, V. A. M. S. This section number 536.105 is used at times in the opinion of the Supreme Court in the instant case although the present applicable section number is § 536.150, R. S. Mo. 1959.

After the decision in **Barker v. Leggett**, 295 S. W. 2d 536, appellants filed anew, in writing, their claims for attorneys' fees with the Superintendent of Insurance who reviewed and denied them on their merits, 359 S. W. 2d 790, 800. Thereupon, appellants filed suits to review the Superintendent's denial of their claims in the Circuit Court under § 536.150, R. S. Mo. 1959. Upon dismissal of their suits by the Circuit Court for failure to state a claim upon which relief could be granted, appellants appealed to the Supreme Court of Missouri which, after briefs and hearing, affirmed the Circuit Court, and its unanimous decision is the subject of this appeal.

For a complete statement of the facts in this case which are not in dispute, and for a history of previous litigation in the Supreme Court of Missouri, we refer to the opinion in this appeal, 359 S. W. 2d 790.

## ARGUMENT

### This Court Has No Jurisdiction of This Appeal.

An examination of the record and the opinion clearly shows that the validity of a state statute was not drawn in question on any ground whatever. Consequently, there was no decision in favor of or against the validity of any state statute.

### No Substantial Federal Question Is Involved.

#### Appellants Have Not Been Denied Due Process.

Appellants charge they were denied due process because: "The Division Opinion herein denied plaintiffs all access to the Courts or quasi judicial tribunals and the right to a judicial or quasi judicial remedy. 259 S. W. 2d 790." Jur. Stat. 2.

Such charge is directed against the ruling on the merits of appellants' claims based on appellants' contract of employment. The interpretation of this contract presents no Federal question.

The opinion refers to the previous case of **Aetna Insurance Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, decided in 1938. The opinion here states the Court in that case held, and the Court has frequently held ever since, that the contract for fees earned by Barker and Jacobs made such fees payable only from funds realized in the restitution proceedings; that the contract providing for the payment of any such fees out of such funds was invalid; that Barker and Jacobs were held chargeable with knowledge of that fact and were, therefore, prevented from recovering such fees from said funds under any theory of estoppel or otherwise. The opinion continues, it was not shown or contended that there was any agree-

ment the fees should constitute a charge against the insurance companies or should constitute an expense against the insurance department. Thus the Court found appellants under the terms of their contract were barred from receiving payment and Barker and Jacobs were not deprived of fees legally owed to them. **State v. Leggett**, 359 S. W. 2d 790, 799.

Surely the decision against appellants that under the terms of their contract they cannot recover in this case is not a proper ground for a claim of denial of due process. The final judgment of the Court against appellants based on the interpretation of their contract, the very foundation of their claims, should bring this litigation to an end. What further access to the courts and tribunals and what further remedies should appellants be entitled to?

In **Jacobs v. Leggett**, 295 S. W. 2d 825, 832, the Court said on this very same contention by the same parties: "The right of contract is not unqualified and absolute, but is subject to reasonable regulation and restriction in the public interest." **West Coast Hotel Co. v. Parrish**, 300 U. S. 379, 392-3; **Yeiser v. Dysart**, 267 U. S. 540."

And to go back again to **Aetna Insurance Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, 1168, the Court held there that the Missouri Insurance Code providing for the supervision and regulation of insurance companies rests in the public interest, and is a valid exercise of the police power through administrative officers. After finding that the impounded fund should be turned over to the policy holders, the Court ruled: "The trial court being without authority to interfere with the insurance code of this state, it follows that it erred in allowing the respondents fees from the impounded fund."

Appellants have enjoyed access to the courts since the original case on their claims for fees in 1938 and to every

remedy ingenious counsel could devise. The opinion in this case lists six prior Supreme Court cases on these very same claims.

In the present proceedings appellants first submitted their claims in writing to the Superintendent of Insurance for review. The Superintendent reviewed the claims without a hearing and denied them, holding he had no authority to allow them under the provisions of the Missouri Insurance Code. In the previous related case of **State v. Jensen**, 318 S. W. 2d 353, 358-9, the Supreme Court held there was no statutory requirement that the Superintendent hold an oral hearing on such claims as these, before ruling on the claims. Thus, appellants pursued their remedy under the Insurance Code, and were accorded a proper review by the Superintendent. **State v. Leggett**, 359 S. W. 2d 790, 806.

Thereafter, appellants instituted two suits in the Circuit Court to review the action of the Superintendent under 536.150, R. S. Mo. 1959, of the Administrative Procedure Act. Motions to dismiss appellants' petitions were filed, argued and briefed in that Court. The Circuit Court dismissed the petitions for failure to state claims upon which relief could be granted. Accordingly, appellants exercised their right of review under the Administrative Procedure Act. From the judgments of dismissal the appellants appealed to the Missouri Supreme Court. The cases were briefed and argued before Division 1 of that Court, resulting in the opinion and judgment in favor of appellees now on appeal to this Court.

Even if the decision of the Missouri Supreme Court might be assumed to be erroneous, still appellants may not properly claim it deprived them of due process. In the case of **Ex parte Converse**, 137 U. S. 624, discussing due process this Court held: "But the State cannot be deemed guilty of a violation of its obligations under the

Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction." Appellants have not raised any jurisdictional questions about the decision here appealed from.

Appellants argue that since "fair play" is the essence of due process, it is not fair play to deny Barker and Jacobs a judicial forum and a judicial remedy available to all others similarly situated as they claim the decision on appeal has done. We have demonstrated, supra, that Barker and Jacobs have not been denied due process.

It seems to us that the principle of fair play should also be applicable to appellee Aetna Insurance Company and to all the other insurance companies constituting the class Aetna represents. On a motion for restitution sustained by the Circuit Court of Cole County, Missouri, Aetna and the other insurance companies paid into court the full amount of the judgment for restitution in excess of $2,750,000 in 1935, **Aetna Ins. Co. v. O'Malley**, 343 Mo. 1232, 124 S. W. 2d 1164, 1166. On February 18, 1936, the Court discharged Aetna and all other insurance companies and sureties "of all further liability of every kind and character arising from the restitution proceeding." **Aetna Ins. Co. v. O'Malley**, 342 Mo. 800, 118 S. W. 2d 7, 7.

After paying the judgment in full into the Circuit Court and being discharged from all further liability, is it conceivable that fair play would require Aetna and the other insurance companies now to pay Barker and Jacobs their attorneys' fees for services in the case which discharged Aetna and the other insurance companies from all further liability? This, after more than 26 years, Barker and Jacobs are now attempting to accomplish through an assessment by the Superintendent against Aetna and the other insurance companies. We submit no principle of fair play and justice should permit this.

This Court in **Shelley v. Kraemer**, 334 U. S. 1, 22, said: "The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals."

If fair play is the essence of due process, the same must be true of due process.

Appellants make numerous charges that the decision in the instant case is in conflict with previous decisions of the Court **en Banc** and fails to follow controlling decisions of the Court **en Banc** in that such decisions have held that the Superintendent of Insurance should allow appellants' claims for fees, and have held that appellants are entitled to recover reasonable compensation. The decisions relied on to sustain these charges are **Jacobs v. Leggett**, 295 S. W. 2d 825; **Barker v. Leggett**, 295 S. W. 2d 836 and **State v. Jensen**, 318 S. W. 2d 353.

These decisions afford absolutely no support whatever for appellants' charges as a reading of them will readily disclose. In no instance did these cases attempt to decide the merits of the claims. In both the Jacobs and the Barker cases the judgments of the trial court dismissing the cases were affirmed. In **State v. Jensen**, 318 S. W. 2d 353, 364, the Court said: "However, we have not decided on the merits of plaintiffs' [Barker and Jacobs] claims or the method by which they may be paid."

Appellants also claim in the three cases above cited the Court **en Banc** held appellants had a remedy under the Insurance Code with a right of review under the Administrative Procedure Act. We have shown earlier in this motion that appellants exercised both their remedy and their right of review.

Appellants have relentlessly pursued every remedy available to them. At no point in this protracted litigation have the appellants been denied access to the courts or

to administrative agencies. Time and again the appellants' claims have been presented, heard and ruled against them. There is no conceivable basis for appellant's claim of denial of due process in these circumstances.

**B. Judgment Did Not Impair Obligation of Plaintiffs' Contract.**

Appellants contend "The opinion of Division No. 1 of the Missouri Supreme Court not only impaired substantial contractual rights but destroyed the contract". Jur. Stat. 28.

In this case no legislative action by the state is involved, or even claimed to have impaired the obligation of appellants' contract. Appellants base their contention of impairment solely on the Court's judgment.

It has been settled by a long line of decisions that the provision of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed against impairment by legislation and not by judgments of courts. **Barrows v. Jackson**, 346 U. S. 242, 260; **Tidal Oil Co. v. Flanagan**, 263 U. S. 444, 451; **Kryger v. Wilson**, 242 U. S. 171, 176.

Under the principle announced in these cases there is no Federal question of the impairment of the obligation of plaintiffs' contract in this appeal.

**C. Appellants Were Not Denied Equal Protection of the Laws.**

Appellants repeat the charge that Division 1 in this case failed to follow the rulings of the Court *en Banc* in **Jacobs v. Leggett**, 295 S. W. 2d 825; **Barker v. Leggett**, 295 S. W. 2d 836; and **State ex rel. Leggett v. Jensen**, 318 S. W. 2d 353. Appellants again argue these cases held they were entitled to recover reasonable compensation for their serv

ees on a rule of law and not on contract. We flatly assert these cases made no such ruling and again suggest a reading of these decisions will demonstrate this to be true.

Appellants claim the Court has discriminated against them by denying them fees for their service while other lawyers, namely, Weatherby, Lauf and Cook received compensation for their services. There is nothing in the record in this case or in the opinion that shows this matter was ever raised or considered in this case. It has been interjected for the first time in this appeal. Even if the matter were properly before this Court, appellants' contention, is totally without substance.

Appellants have heretofore advanced the same argument that payments made to the above named lawyers while denying payments to appellants deprived them of equal protection of the laws in the case of **Jacobs v. Leggett**, 205 S. W. 2d 828. The opinion in that case considered the payments to these lawyers (l. c. 828), and then ruled: "They [appellants] contend that they have been denied equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States in that Weatherby and Lauf and Cook by way of settlement were permitted to keep the sums which had been paid to them out of the fund prior to the decisions of this court holding such payments illegal. Our decisions have uniformly held that the fees of Weatherby and of Lauf and Cook, as well as the plaintiffs, could not lawfully be paid out of the funds." (l. c. 831)

The opinion then quotes with approval from **Barker v. Leggett**, 102 F. Supp. 642, 643 (D. C., Mo.), where the same argument was made by one of these appellants as follows: "The contention of plaintiff that he is being denied the equal protection of the law, because the State has not compelled Lauf, Cook and Weatherby to repay

to the fund the various sums paid to them, but, on the contrary, has compromised litigation instituted by the State looking to that result, is without merit. In Weatherby's case, supra, and in Aetna Ins. Co. v. O'Malley, 342 Mo. 880, 118 S. W. 2d 3, the payments so made from the fund to said parties were held to be illegal under State law by the Supreme Court of Missouri. The refusal of the State to countenance further illegal payments to be made from the fund in question cannot be held a denial of equal protection of the law. Meyer v. Territory of Hawaii, 9 Cir., 164 F. 2d 845, 849."

This argument by appellants, we repeat, not having been raised throughout the proceedings and not considered in the opinion of the Court is not properly before this Court in this appeal. The Supreme Court of Missouri did not at any time authorize or approve the payments to these three lawyers out of the fund. Even if the Court had done so, its decision or decisions so ruling would not sustain appellants' claim here that they were denied equal protection of the laws.

This Court has held, the 14th Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions and more than, in guaranteeing due process, it assures immunity from judicial error. Such rights under the 14th Amendment may not be based on a decision between strangers which is irreconcilable on a matter of law with the decision under review. **Milwaukee E. R. & L. Co. v. Wisconsin, etc.**, 252 U. S. 100, 1056.

## CONCLUSION

Appellee Aetna Insurance Company submits the decision of the Missouri Supreme Court did not rule on the validity of any State statute, the decision is correct, is properly based on well-settled principles of law, presents no sub-

stantial Federal question, and the case requires no further argument and consideration. Therefore, appellee prays its motion to dismiss the appeal be dismissed or, in the alternative, the judgment of the Missouri Supreme Court be affirmed.

Respectfully submitted,

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**Proof of Service.**

I, James M. Douglas, counsel for Aetna Insurance Company, an appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served copies of the foregoing on all parties as follows:

1. On the appellants State of Missouri, ex rel. Mildred B. Johnson, Adm'x, et al. by depositing two copies in the United States Mail, with regular postage prepaid, in an envelope addressed to their attorney of record, Walter A. Raymond, Esquire, 915 Grand Avenue, Kansas City, Missouri, on the 11th day of December, 1962.

2. On appellee Superintendent of the Division of Insurance of the State of Missouri by depositing two copies in the United States Mail, with regular postage prepaid, in a

envelope addressed to his attorney of record, Honorable Thomas F. Eagleton, Attorney General of the State of Missouri, Supreme Court Building, Jefferson City, Missouri, on the 11th day of December, 1962.

3. On appellee State Farm Mutual Insurance Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, Thomas E. Deacy, Sr., Esquire, 2300 Bryant Building, Kansas City 6, Missouri, on the 11th day of December, 1962.

4. On appellee Hardware Mutual Casualty Company by depositing in the United States Mail, with regular postage prepaid, two copies in an envelope addressed to its attorney of record, George A. Spencer, Esquire, 517 Guitar Building, Columbia, Missouri, on the 11th day of December, 1962.

.....

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